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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 1229, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit and Petition for Leave to Intervene

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Local Union No. 1229, International Brotherhood of Electrical Workers prays that the petition of the National Labor Relations Board for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered on November 20, 1952 (R. 265-270) be denied and that the petition of Jefferson Standard Broadcasting Company for leave to intervene be denied.

JURISDICTION

The reference in the Petition (page 2) to Section 10 (e) of the National Labor-Management Relations Act, as amended, does not appear to be correct. This case

arose out of a petition for review filed in the Circuit Court of Appeals under Section 10 (f) of the Act (R. 2) by an aggrieved party which originally filed a charge that Jefferson Standard Broadcasting Company (hereinafter referred to as the Company) had committed unfair labor practices in violation of the Act.

QUESTIONS PRESENTED

(1) Whether the Petition presents a case of extraordinary circumstances warranting departure from the usual rule that the Supreme Court will not grant certiorari to review a non-final judgment of the Circuit Court of Appeals.

(2) Whether the publication of a true handbill by employees engaged in a labor dispute, commenting fairly but adversely on the quality of the employer's television operations and having an object found lawful by the Board, is a protected concerted activity under Section 7 of the Act.

STATEMENT

I. The Facts

Respondent sets forth below a few items which it believes are required to be stated to give a more exact description of the facts and decisions in this case. This limitation is not intended to admit all other facts stated by Petitioner or to admit the Petitioner's characterization of the conduct engaged in by the employees in this case.

(1) The impasse in bargaining negotiations developed because the employer insisted upon a revision in the arbitration clause which would give it the right to discharge employees for any cause whatsoever, just or unjust, and which would limit the arbitrator's authority solely to the question of whether the acts or omis-

sions assigned by the Company for the discharge did in fact occur. The Union insisted upon the retention of the existing clause providing that the Company should have the right to discharge for just cause and if the union believed a discharge to be unjust such question would be appropriate for decision by the arbitrator. (R. 48-49).

(2) The placards and handbills used by the Union prior to the publication and distribution of the handbill in question carried not only the name of the Union but also the words "radio broadcast technicians" or "radio technicians." (R. 49-50).

II. The Board's Decision

The Board stated in its decision that "For these reasons, without attempting to formulate a test which will decide every imaginable case involving similar questions as to the scope of Section 7, we hold that the employees in this case *went beyond the pale* when they published the 'second-class handbill.'" (R. 17). (Italics supplied). It was upon the basis of this holding and the previous characterization of the employees' conduct as "indefensible" (R. 16) that the Board dismissed the complaint insofar as it alleged violations of Section 8 (a), (1) and (3) of the Act.

III. The Court's Decision

The court below, in its unanimous decision, stated that "By giving 'indefensible' a vague content different from 'unlawful' the Board misconceived the scope of the established rule. We think the Board *failed to make the finding essential to its conclusion* that the concerted activity was not protected. Sound practice in judicial review of administrative orders precludes this court from determining 'unlawfulness' without a

prior consideration and finding by the Board. Since the initial judgment is within the province of the Board, the petition for modification and enforcement of that part of the order before the court is denied and the case is remanded to the Board for further proceedings not inconsistent with this opinion." (R. 268-270). (Italics supplied).

REASONS FOR NOT GRANTING THE WRIT

The primary question raised by this case is whether this Court should determine that it is appropriate to grant the writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a non-final judgment.

It is recognized that there is legal power in this Court to review non-final judgments of Federal Courts, as distinguished from the want of jurisdiction to review a judgment of the highest court in a state if such judgment is not final. (*Montgomery Building and Construction Trades Council v. Ledbetter Erection Company, Inc.*, 344 U. S. 178.) It is clear, however, that non-final judgments of Federal Courts are considered appropriate for review only where extraordinary circumstances are shown warranting the conclusion that such review is fundamental to the further conduct of the case. It must, of course, also be shown that the general rules of this Court applicable to the determination of a petition for a writ of certiorari in the case of a final judgment are satisfied.

The fact is that the instant Petition does not in any way take account of the point that the judgment below was non-final, being a judgment to reverse for failure of the administrative agency to make an essential finding and to remand for further proceedings by the agency not inconsistent with the court's opinion. It is re-

spectfully submitted that when this case is considered from either the standpoint of the rules of this Court applicable to non-final or final judgments the writ should not be granted.

This case does not present a jurisdictional issue such as was before this Court in *Larson v. Domestic and Foreign Commerce Corporation*, 337 U. S. 682-685, fn. 3 or *Land v. Dollar*, 330 U. S. 731, 734, fn. 2. Nor does it present a constitutional question such as was before this Court in *U.S.A. v. General Motors Corporation*, 323 U. S. 373, 377. See *American Construction Company v. Jacksonville Railway*, 148 U. S. 372, 384. In *National Labor Relations Board v. Mexia Textile Mills*, 339 U. S. 563, the very question before this Court was whether the Circuit Court had power to remand to the Board for the purpose of taking evidence on the matter of compliance with the Board order even though the order was before the Circuit Court on petition for enforcement.

The question of statutory interpretation sought to be presented by the Petition is whether the ruling of the court below that "protection under Section 7 . . . is withdrawn only from those concerted activities which contravene either, a) specific provisions or policies of the Act or of related federal statutes or, b) specific rules of other federal or local law that is not incompatible with the Board's governing statute" (R. 267) is in accord with the decisions of this Court or whether the Board's standards of "indefensibility" and "beyond the pale" are to be the legal measure of the protection of concerted activities under Section 7.

It must be noted that from a procedural point of view the judgment of the Circuit Court of Appeals is not an enforceable order. It is rather a reversal of the Board's order dismissing the complaint insofar as

it alleges that the Jefferson Standard Broadcasting Company violated Section 8 (a) (1) and (3) of the Act by discharging those individuals who published and distributed the leaflet entitled, "Is Charlotte a Second-Class City?", which is set forth on page 4 of the Petition. The judgment of the court below also remanded the case to the Board for further proceedings not inconsistent with the opinion. The remand does not direct the Board to enter an order finding violations of Section 8 (a) (1) and (3) nor does it direct or require the taking of additional evidence. It appears to require only that the Board make a determination on the issues presented by the allegations of the complaint relating to Section 8 (a) (1) and (3) of the Act under the standard of interpretation of Section 7 which has been announced by the court below.

It should be further noted that the Petition does not present the precise issue of whether an act found by the Board to be lawful, though indefensible, is protected since the Board did not find whether the conduct, as distinguished from its object, was lawful or unlawful. As stated in the Petition, "In view of their conclusion that the distribution of the handbill was not protected because it did not relate to the employer-employee relationship, *the majority did not reach the question whether the activity was 'unlawful'* (R. 17)." (Petition, 9, fn. 2). (Italics supplied). The Board stated in its decision that "*We do not reach and do not decide the question,* secondarily raised by Respondent [Jefferson Standard Broadcasting Company], whether the handbill in question constituted actionable defamation." (R. 17, fn. 18). (Italics supplied).

Since 1939 the rule of this Court has been that neither the Wagner Act nor the Labor-Management Relations Act, 1947 protect concerted activities where il-

legal means are used and, therefore, no remedy can be given in such cases when discharges of employees for illegal acts occur. *National Labor Relations Board v. Fansteel Metallurgical Corporation*, 306 U. S. 240. See *National Labor Relations Board v. The Sands Manufacturing Company*, 303 U. S. 332; *Southern Steamship Company v. National Labor Relations Board*, 316 U. S. 31. As stated in *UAW v. Wisconsin Employment Relations Board*, 336 U. S. 245, 257-258, "but because . . . legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert."

It is respectfully submitted that the avoidance of the issue of lawfulness by the Board in its decision and this Petition is sought to be justified on a ground which is an inversion of the true situation. The first question which should be reached by the Board and which the Board should decide is the status of the conduct in this case under the clearly established rules of this Court rather than the legal propriety of the Board's rule in this case which the Circuit Court of Appeals has termed of "vague content."

It is further respectfully submitted that the Petition misconceives the function of the writ when, under the procedural circumstances of this case, it seeks to avoid the administrative agency's burden of making the initial finding on the legality of the conduct in question by transferring the burden to this Court of determining the validity of the broad and indefinite rule of administrative power which the Board has asserted in its decision and this Petition. It cannot be known at this stage of the proceeding whether the Board will find the conduct lawful or unlawful. If the Board finds the conduct unlawful, then it will not have been necessary for this Court to have ruled on

the question of whether the Board's broad rule of administrative power is sound. If, on the other hand, the Board should find the conduct lawful and issue an order, such order would not become legally enforceable unless the appropriate Circuit Court of Appeals granted a petition for enforcement under Section 10 of the Act after a full review of the case upon complete findings by the Board.

In the event such a case were to develop, this Court would not be bound by its denial of the writ, to follow the rule of the court below on the question of the proper definition of the scope of protected activities under Section 7 of the Act. See *White v. Higgins*, (C. A. 1) 116 F. (2d) 312, 317, where it is stated that:

> "When the doctrine of law of the case is being invoked in an intermediate appellate court, such as the Circuit Court of Appeals, another consideration enters. After we affirm a judgment on the ground that our decision on an earlier appeal has become the law of the case, the Supreme Court is nevertheless free to take the case on certiorari and reverse our judgment . . . The Supreme Court frequently does so . . . Sometimes it does so even where application for certiorari to review our earlier judgment had been applied for and denied."

In view of these considerations it does not appear that the granting of the writ at this stage of the proceeding is fundamental to the further conduct of the case even if the standards otherwise applicable to the appropriateness of reviewability of final judgments were satisfied.

Turning to a consideration of the reasons presented in the Petition for granting the writ, the first conten-

tion of the Petitioner is that "The issue is recurring and is one of fundamental importance in the operation of the statute." (Petition, 11). The quoted statement is, of course, a proper statement of an applicable rule of this Court. It is respectfully submitted, however, that the quoted statement is a conclusion not supported by the facts of this case. The Petition itself states, in reviewing cases allegedly in conflict with the decision of the court below, that "While the legality or illegality of the concerted activity has been found to be significant and *often times controlling,* (See e.g., *American News Company,* 55 NLRB 1302), (Strike for wage increase not authorized by War Labor Board), it has *by no means been determinative in all situations.*" (Petition, 12). (Italics supplied).

It is our view that the cases cited in the Petition in suport of Petitioner's claim of alleged conflict can be reconciled under the established rule that unlawful means for a lawful object or lawful means for an unlawful object are not protected by Section 7. (See *infra.,* pages 11-13). It is further submitted that the question of whether it is appropriate to grant the writ turns upon the recurring nature and the fundamental importance of actual cases rather than the dicta and the principles stated by the Board or the courts in such cases.

Petitioner contends, as an additional reason for granting the writ, that "In the present state of the law, neither employer nor employee can move with assurance when any unorthodox type of activity is involved in a labor dispute. The employees risk discharge; the employer may be found guilty of an unfair labor practice with liability for back pay." (Petition, 11). The object of certainty in legal rules is desirable, although not always capable of achievement. The Board ad-

mitted, however, in its decision, as distinguished from its Petition, that it was not "attempting to formulate a test which will decide every imaginable case involving similar questions as to the scope of Section 7." (R. 17). And the dissenting member of the Board charged that the decision of the Board would produce uncertainty:

> "I find it a startling decision—startling because it necessarily sets aside principles which this Board with court sanction has heretofore recognized as the proper test of concerted activity; startling because it has shriveled the previously recognized area of statutory protection for concerted activities and *left employers, employees, and the Board itself without any certain standards to mark the remaining greatly circumscribed area.*" *(R. 28-29).* (Italics supplied).

In further contrast to the object of certainty which the Petition contends will be accomplished by the granting of the writ and the review of this case, there is the language of the rule which the Petition deems sound. The Petitioner takes the view that the decisions of the courts on the question involved in this case can be reconciled on the basis of the following broad rule:

> "The decision in each case turned on the fact (sic) that the employees' concerted activities, considered in the light of all the circumstances, including the nature of their acts and the impact of the conduct on the employer's legitimate interest, were *unjustifiable.* Each case involved an appropriate adjustment of the 'conflicts and interest between employer and employees.'". (Petition, 19). (Italics supplied).

It is respectfully submitted that, whatever the merit of the above rule, it is not a rule of automatic appli-

cation. From the standpoint of certainty, it is our view that the specific results of the broad rule stated in the above quotation from the Petition cannot be successfully predicted by private parties subject to the Act in advance of its application by the Board.

The Board seeks to show that the so-called rule of "indefensibility" which it applied in the instant case dates back to *Harnischfeger Corp.*, 9 NLRB 676, (Petition, 11). That case was decided November 8, 1938. If the meaning of the word "indefensible" did not then include the illegal acts involved in *Fansteel* (illegal seizure of property), *Sands* (breach of contract) and *Southern Steamship Corporation* (mutiny), *supra*, all of which cases were before this Court after the date of *Harnischfeger*, it is difficult to accept the proposition that the same word now includes the privileged publication of fair comment involved in the instant case.

The Petition sets out on pages 18 to 19 the decisions of this Court and of the Circuit Courts of Appeals which it claims to be in conflict with the decision of the court below. It is respectfully submitted that there is no such conflict.

United Automobile Workers v. Wisconsin Employment Relations Board, supra, did not raise the question of whether discharges for the employee conduct there involved were violations of the Act because the conduct was protected by section 7. This Court emphasized that the employer had not resorted to discharge or other retaliatory measures and its motive in bringing the state law into operation was not even alleged to be antiunion. The Court decided that there was no fixed Board interpretation that all work stoppages are protected activities and therefore the state

law was not required to be ruled invalid as in conflict with a Federal law.

In *Maryland Drydock Co. v. National Labor Relations Board,* (C. A. 4) 183 F. (2d) 538, the Court ruled that the publication of libelious matter was not protected by section 7 of the Act.

Albrecht v. National Labor Relations Board (C. A. 7) 181 F. (2d) 652, upheld the Board's decision that section 7 of the Act does not protect the refusal of foremen to perform, during a strike of rank and file employees in which the foremen were not involved, certain duties which were essential for the protection and preservation of the employer's plant. The Board found the refusal of the foremen to be a "serious breach of their duty to the Respondent [employer]." See *National Labor Relations Board v. Rockaway News Supply Co.*, United States Supreme Court, October Term, 1952, *decided* March 9, 1953.

In *Joanna Cotton Mills Co. v. National Labor Relations Board,* (C. A. 4) 176 F. (2d) 749 the purpose of the conduct was not the "mutual aid or protection" specified in section 7 but rather the purpose of an individual to get rid of, or humiliate, a supervisory employee with whom he was angered because of the supervisor's rebuke of the employee for operating a punch board or raffling device. The Court, in reversing the Board, stated that there was no evidence upon which it could have reasonably been thought that the dismissal of the supervisor would have been of aid or protection to the employees in any proper sense.

In *National Labor Relations Board v. Reynolds International Pen Co.*, (C. A. 7) 162 F. (2d) 680, the Court, in reversing the Board, held there was no evidence to show that the discharges in question had an antiunion motive, that the burden of proof to show dis-

crimination was on the Board—not the employer and that a walkout to protest the demotion of a foreman because of sympathy with him not related to a labor dispute was not protected by section 7 of the Act.

National Labor Relations Board v. Montgomery Ward Co., 157 F. (2d) 486, held the Board erred in ruling that the refusal of workers at one plant of the employer, which was not on strike, to process orders from another plant which was on strike is protected under section 7 of the Act. The Court, relying upon such cases as *National Labor Relations Board v. Sands Manufacturing Co., supra,* ruled there was a breach of the contract of hire not protected by section 7 of the Act.

It is respectfully submitted that none of the decisions relied upon by the Board go so far as to hold that the publication of matter of non-libellous character for an object held lawful by the Board is not protected by section 7 of the Act. See *Newell, Slander and Libel* (4th ed.) pp. 550-551; *State v. Greenville Publishing Co.*, 179 N. C. 720; *Lewis v. Carr*, 178 N. C. 578.

It is respectfully submitted, for all of the foregoing reasons that an adequate basis has not been presented by the Petition for the granting of the writ.

OPPOSITION TO PETITION FOR LEAVE TO INTERVENE

Respondent respectfully prays that if the petition for writ of certiorari is denied then the petition of the Company for leave to intervene should also be denied. See *U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131, 176-178. If the petition for writ of certiorari is granted, Respondent states no objection to participation of the Company either as intervenor or as amicus curiae.

The petition for leave to intervene does not cite any

legal authority in support of its contentions. It is believed that the applicable rules of law are as follows:

(1) Respondent had the legal standing to seek review of the decision and order of the Board in the United States Court of Appeals for the District of Columbia Circuit by virtue of the express terms of Section 10 (f) of the Act. *Amalgamated Workers v. Consolidated Edison Company,* 309 U. S. 261, 266; *Albrecht v. National Labor Relations Board, supra, American Newspaper Publishers Association v. National Labor Relations Board,* United States Supreme Court, October Term 1952, No. 53, *decided* March 9, 1953.

(2) The Company could not be made a party respondent to the case before the Circuit Court of Appeals because in a proceeding under Section 10 (f) the petitioner can only contest the order of the Board. He cannot secure its enforcement. *Albrecht v. National Labor Relations Board, supra.* In *American Newspaper Publishers Association v. National Labor Relations Board,* 190 Fed. (2d) 45, the U. S. Court of Appeals for the Seventh Circuit so ruled in granting the Board's motion to strike from the caption of the petition the words "International Typographical Union" and certain named officers of such Union. The language of section 10 (f) of the Act provides only that the Board is required to be served with the petition for review.

The fact is that the Board on December 13, 1951, served its answer in the proceeding below upon Guthrie, Pierce & Blakeney, Att: *Whiteford S. Blakeney,* Esquire, Johnston Building, Charlotte, N. C., and Cochran, McClenaghan & Miller, Att: *F. T. Miller, Jr.,* Esq., Law Building, Charlotte, N. C., Counsel for Respondent before the Board. (R. 9). The oral argument before the

U. S. Court of Appeals for the District of Columbia Circuit was held April 16, 1952. (R. 265). The Company, therefore, had four months during which it could have moved for leave to intervene in the proceedings before the court below. The Company chose not to intervene. The fault it charges is its own.

The statements made in the brief in opposition to the petition for writ of certiorari are also applicable to the substantive matter set forth in the petition for leave to intervene.*

* It is assumed that the statement purportedly made by the "head of the International Union" (Petition for leave to Intervene, 11), although irrevelant, is not intended to be prejudicial. The undersigned have been authorized by the International President of the International Brotherhood of Electrical Workers to state that he did not make the quoted statement or any other statement having the same meaning to any person. The quoted statement is drawn from the transcript of record, pages 221-222 and was given in testimony by a Mr. Charles H. Crutchfield, Vice President and General Manager of the Company, on cross examination by Counsel for the Board. (R. 135). The person to whom Mr. Crutchfield attributed the statement is one of approximately 150 representatives on the staff of the International Union. It may also be noted that neither Respondent Local Union 1229 nor the International Brotherhood of Electrical Workers was represented by legal counsel at the hearing before the Trial Examiner of the Board either for the purpose of direct or cross examination.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied and that the petition for leave to intervene should also be denied.

Respectfully submitted,

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MARCH 30, 1953.